DAVIES MWAPE v THE PEOPLE (1979) Z.R. 54 (S.C.)

SUPREME COURT
GARDNER, BRUCE-LYLE, JJ.S. AND CULLINAN, A.J.S.
9TH, 23RD JANUARY AND 20TH FEBRUARY, 1979
S.C.Z. JUDGMENT NO. 8 OF 1979

Flynote
Criminal law and procedure - Juvenile offenders - Determining age of - Procedure - Relying on ocular observation - Whether sufficient.

Headnote
The appellant was convicted on his own plea of guilty of house breaking and theft and sentenced to two years' imprisonment with hard labour. He appealed on the ground that he was a juvenile and should have been tried and sentenced as such. The trial magistrate had made ocular observation and noted that the accused was above eighteen years.

Held:
(i) Under s. 118 (1) of the Juveniles Act, it is sufficient for a court to rely solely on ocular observation, and if it appears that an offender is a juvenile, an inquiry must be made to ascertain his exact age for the purpose of considering the powers of the court in relation to such offender. However where by ocular observation the offender is obviously an adult, the court is not put on its inquiry.
(ii) When such inquiry has been made, the provision that an order or judgment of the court shall not be invalidated by any subsequent proof that the age of that person was not correctly stated or estimated by the court comes into effect, and there cannot be any appeal on the question of age, provided that the inquiry made was in fact a due inquiry and not defective in any way.

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Where no such enquiry has been made the finding as to the offender's age is appealable.

Legislation referred to:
Juveniles Act, Cap. 217, s. 118 (1).

For the appellant: In Person.
For the respondent: A.H. Obote Odora, State Advocate.

Judgment

GARDGNER, J.S.: delivered the judgment of the court.

The appellant was convicted on his own plea of guilty of housebreaking and theft; the particulars of the charge being that he together with another, broke and entered a dwelling house and stole personal property to the value of K1,078.01n. He was sentenced to two years' imprisonment with hard labour and he appeals to this court on the grounds that he is a juvenile and should have been tried and sentenced as such.

The charge sheet prepared by the public prosecutor indicated that both the appellant and his co-accused were aged eighteen years. Before taking a plea, the magistrate made a note on the record as follows: "I am not convinced that the two accused are eighteen years. They are above eighteen years and so I treat them as adults." We take it that by making this decision the magistrate was aware of the law relating to juveniles and he found that both of the accused had attained the age of nineteen years.

There is no specific provision in the Juveniles Act, Cap. 217 setting out the precise procedure

which should be adopted to ascertain the age of accused persons. Section 118 (1) reads as follows:

> "Where a person, whether charged with an offence or not, is brought before any court otherwise than for the purpose of giving evidence, and it appears to the court that he is a juvenile, the court shall make due inquiry as to the age of that person, and for that purpose shall take such evidence as may be forthcoming at the hearing of the case, but an order or judgment of the court shall not be invalidated by any subsequent proof that the age of that person has not been correctly stated to or estimated by the court, and the age presumed or declared by the court to be the age of the person so brought before it shall, for the purposes of this Act, be deemed to be the true age of that person and, where it appears to the court that the person so brought before it has attained the age of nineteen years, that person shall, for the purposes of this Act, be deemed not to be a juvenile."

It might be argued that the section relates solely to the necessity for a court to ascertain the exact age of a juvenile in order to consider what are the powers of the court in relation to any order to be made under the Act. However the last four lines of the section, which state that where it appears to the court that a person has attained the age of nineteen years he shall be deemed not to be a juvenile, indicate that the purpose of the section is

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also directed to the question as to whether the court should sit as a juvenile court or as an ordinary court. We are quite satisfied that s. 118 (1) also relates to the duty of a court when considering the nature of its jurisdiction.

It is necessary now to consider whether it is sufficient for a court to rely on ocular observation alone in making a decision as to whether or not an accused is a juvenile. We are of the opinion that the section indicates that it is sufficient for a court to rely solely on ocular observation, and where it appears that an offender is a juvenile an inquiry must be made to ascertain his exact age for the purpose of considering the powers of the court in relation to such offender. When such inquiry has been made the provision that an order or judgment of the court shall not be invalidated by any subsequent proof that the age of that person has not been correctly stated or estimated by the court comes into effect, and there cannot be an appeal to a higher court on the question of age, provided that the enquiry made is in fact a due inquiry and is not defective in any way. When a court relies on ocular observation to decide that a person has attained the age of nineteen years no inquiry is needed; but the provision of the section that an order or judgment of the court shall not be invalidated by any subsequent proof that the age of the person has not been properly stated or estimated by the court does not come into effect and the decision of the court on this point is appealable. In our view, whenever a court is put on its inquiry as to the age of a possible juvenile offender it is the duty of the court to carry out due inquiry as to the age of that offender. As, in this case, the charge sheet indicated the age of the appellant as being eighteen years, we consider that the trial court should have been put on its inquiry. In the result the decision as to the age of the appellant is not protected by the provision against invalidation and it is within the powers of this court to deal with the question on appeal.

There are many cases in which a court could not possibly be said to an be put on its inquiry and a court would be entitled to over-rule a frivolous claim to be a juvenile made by a person who, by ocular observation, is obviously an adult. In such cases, although the court's decision would be appealable and not protected by the provision against invalidation, such an obviously frivolous claim could not succeed on appeal. The purpose of this judgment is to indicate to courts that in all borderline cases the safest course for them to take is to carry out a due inquiry in accordance with the terms of the section.

As we have said, we are satisfied that the trial court should have been put on its inquiry in this case and having seen the appellant we are satisfied that the claim was not frivolous. Evidence should have been called from relatives, friends, or, if necessary, a medical expert witness in order to ascertain the age of the appellant; ocular observation was not enough.

We have decided that it would be impracticable to send this case back to the lower court in order that the correct procedure to ascertain the age of the appellant should be put into effect, and we,

therefore, ordered, on his last appearance before us, that the appellant should be examined

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medically, as to his age. A medical report has now been submitted to this court indicating that a radiological examination reveals the true age of the appellant to be over twenty years. In the event therefore it is proper that he should have been dealt with as an adult.

The appellant was sentenced to two years' imprisonment with hard labour for taking part in a housebreaking and theft of property to the value of over a thousand kwacha; of the property stolen only that to the value of K309 has been recovered. The trial magistrate took into account the fact that the appellant was a first offender and had pleaded guilty. This sentence was not wrong in principle nor does it come to us with a sense of shock.

The appeal against sentence is dismissed.
Appeal dismissed
